

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE: NATIONAL PRESCRIPTION)	CASE NO. 1:17-MD-2804
OPIATE LITIGATION)	
)	SPECIAL MASTER COHEN
THIS DOCUMENT RELATES TO:)	
“All Cases”)	
)	<u>ORDER CLARIFYING</u>
)	<u>DISCOVERY RULING NO. 24</u>
)	

AGENDA ITEM 310

On March 23, 2021, the Special Master issued Discovery Ruling No. 24 (“DR-24”), addressing the timeliness of Plaintiffs’ challenges to certain privilege claims made by Walgreens during Track One. *See* docket no. 3658. Via email, Plaintiffs sought clarification of DR-24, asking three questions. Walgreens responded. The Special Master now clarifies as follows.

First, in DR-24, the undersigned explained that, “[t]o carry the threshold burden of showing present review of documents listed in Track One privilege logs is appropriate, a party seeking a ruling from the Special Master must demonstrate with particularity that the documents it challenges are similar or related to specific documents that have: (a) previously been downgraded pursuant to a bellwether privilege ruling, or (b) already been produced as non-privileged.” *Id.* at 3. Plaintiffs ask if this includes “documents that have been downgraded [voluntarily] by Walgreens (and not only ones downgraded pursuant to a privilege ruling).” The answer is yes. Any document that

Walgreens originally claimed was privileged but then downgraded is presumably a document it “produced as non-privileged.”

Second, in DR-24, the undersigned declined to take up Plaintiffs’ privilege challenges to 274 documents that Walgreens originally listed in a Track One privilege log, because Plaintiffs had not made the “appropriate showing.” *Id.* at 2 (quoting docket 3527 at 15). In response to this ruling, Plaintiffs write: “we believe that this means that if Plaintiffs [*now*] provide required information for each of the 274 privilege claims, then we can continue with those challenges, and Walgreens will be required to respond – provided that the reasoning/showing is sound. Is this correct?” The answer is no. Plaintiffs are not allowed a second chance to make the required showing.¹

Third, Plaintiffs write they “want to make sure that the issuance of DR 24 does not seek to modify” the last paragraph of the Order entered by the Court overruling Walgreens’ objection to Discovery Ruling No. 23. *See* docket no. 3527 (rejecting an approach that would “limit the rights of future plaintiffs in future case tracks to challenge privilege claims that have not been challenged and resolved in Track One,” “[s]o long as future parties to future case tracks challenge privilege designations in good faith and within the applicable period for discovery”). Plaintiffs may rest assured that the undersigned has neither the power nor the inclination to modify the Court’s Order. That said, any challenge by the Track Three Plaintiffs to documents listed in Track One privilege

¹ It is true that DR-24 “present[ed] the first dispute requiring the Special Master to consider whether a party has made such an ‘appropriate showing,’” and thus represents the first time the Special Master or the Court defined with particularity what a party must show to “carry the threshold burden of showing present review of documents listed in Track One privilege logs is appropriate.” *Id.* at 2, 3. But Plaintiffs’ failure initially to meet *any* of these particularities, together with the Court’s warning that “Track One discovery is now closed,” docket 3527 at 15, together with a general reluctance by the undersigned to allow any party addressing any issue a “second bite at the apple,” yields the conclusion that Plaintiffs may not simply try again regarding their challenges to the 274 documents.

logs must still be supported by the “appropriate showing.”

Because this Order clarifies Discovery Ruling No. 24, the deadline for any party to object to any aspect of Discovery Ruling No. 24 or this Order is extended to April 13, 2021.

IT IS SO ORDERED.

/s/ *David R. Cohen*

**DAVID R. COHEN
SPECIAL MASTER**

Dated: April 6, 2021